PUBLIC PROSECUTOR v. CHUA YEW ENG & ORS.

[A.Cr.J. (Raja Azlan Shah J.) May 30, 1968]
[Kota Bharu — Criminal Appeal No. 13 of 1966]

Customs and Excise — Prohibited goods — Concerned in or importing of — Meaning of "importing" and "concerned in" — Customs Ordinance, 1952, s. 131(1)(a).

The respondents were charged on two charges under section 131(1)(iii) of the Customs Ordinance, 1952, and section 22(1) of the Control of Supplies Act, 1961, respectively. The question for decision in the court below was whether or not there was importation when the *M. S. Harin Panich* 32 with cargo of 2,300 bags of Siam rice entered Tumpat harbour on 7th September 1965. The learned president answered the question in the negative and acquitted the respondents without calling for their defence. On appeal by the public prosecutor,

Held: in this case there was importation when the ship conveying the rice arrived within the limits of Tumpat port. It was clear from the evidence that the respondents had arranged for the importation of the rice from the Bangkok firm who at their instruction had shipped them *via* Tumpat being the ultimate port of call.

Cases referred to:—

(1) *Gopal Navati* v. *P.C. Seth* A.I.R. 1960 Bom. 478.

(2) *Devi Chand J. & Co.* v. *Collector, Central Excise* A.I.R. Mad. 281.

(3) *Additional Collector of Customs* v. *Sitaram* A.I.R. 1962 Cal. 242.

(4) *Radha Kishan* v. *Union of India & Ors.* [1952] 2 S.C.R. 213.

(5) *Heap Hoe & Co. Ltd. Penang*, unreported in Selangor Criminal Appeal No. 32 of 1965.

(6) *Canada Sugar Refineries Co.* v. *The Queen* [1898] A.C. 735.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Salleh bin Abas (Solicitor General) for the appellant.

C. O. Lim for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: The respondents were charged before the president, sessions court, Kota Bharu, on two charges:—

"Firstly, that you on or about the 7th day of September 1965 at Tumpat Port in the State of Kelantan were jointly concerned in importing prohibited goods, to wit, 2,300 bags of rice ex the 'Harin Panich 32' without any import licence contrary to the Prohibition of Imports Order 1954 — L.N. 624/54 — and that you thereby committed an offence under section 131(1)(a) of the Customs Ordinance No. 42 of 1952 and punishable under section 131(1)(iii) of the same Ordinance.

"Secondly, that you on or about the 7th day of September 1965 at Tumpat Port in the State of Kelantan did fail to comply with paragraph 3 of the Foodstuffs Movement (Restriction) (Kelantan) Order 1958 — L.N. 393/1958 — in that you removed a consignment of controlled article, to wit, 2,300 bags of Siam rice imported by your firm to a place outside the States of Kelantan and Trengganu without the permission of the Controller of Supplies; and that you thereby committed an offence under section 22(1) of the Control of Supplies Act, No. 14 of 1961, and punishable under the same".

The important question that fell for decision which in their precise form in which it came before the court below may be stated: whether or not there was importation when the M.S. "Harin Panich 32" with a cargo of 2,300 bags of Siam rice entered Tumpat harbour on 7th September 1965. The learned president in a reserved judgment answered the question in the negative and acquitted the respondents without calling for their defence. Hence the appeal by the public prosecutor.

At the commencement of this appeal I was informed by the Solicitor-General that respondent No. 1 had expired and therefore the appeal against him is deemed to be vacated by virtue of the provisions of section 320 of the Criminal Procedure Code (Cap. 6). I accordingly made the order.

The relevant facts need to be set out in some detail, and after hearing the arguments of counsel I am in no doubt as to what the evidence showed or was capable of showing as to the circumstances of the case.

On 3rd September 1965, 2,300 bags of Siam rice were loaded on board the M.S. "Harin Panich 32" at Bangkok. The ship's captain was handed a copy of the Customs Outward Manifest (Exh. P2) which stated *inter alia* that the shippers were Messrs. Hoe Thai & Co. Ltd. and the consignees were Chop Chin Hin, and that the ship was bound for Tumpat. Chop Chin Hin are importers and exporters, commercial agents, and general merchants of Kota Bharu with a branch at No. 44, Jalan Telok Sisek, Kuantan, (see certificate under Registration of Businesses Ordinance, Exh. P22). Chop Chin Hin are also shipping agents in Kota Bharu with a branch at Tumpat. A few minutes before the ship was due to sail, a second Customs Outward Manifest (Exh. P3) was handed to the captain. The only difference is the name of the consignees which reads, "Messrs. Hock Hin & Co. c/o Chop Chin Hin". Messrs. Hock Hin & Co. are general merchants, importers and exporters, of No. 44, Jalan Temerloh, Mentakab, Pahang, with a branch at No. 40, Jalan Telok Sisek, Kuantan. The destination of the ship is not stated. It is worthy to note that respondent No. 3 is a sleeping partner of Chop Chin Hin and the managing partner of Messrs. Hock Hin & Co. Pausing there for a moment, I ask this inevitable question: why was it necessary to have two Customs Outward Manifests for the same cargo? The answer seems obvious, as can be seen in a moment. After the ship was given the port clearance (Exh. P1) it left Bangkok the same evening for Tumpat, its ultimate port of destination. The crew list (Exh. P4) *inter alia* stated that the last port of call was Tumpat, Kelantan, and the next port of call was Bangkok. Before the ship arrived in Tumpat harbour, Chop Chin Hin received a telegram (Exh. P21) on 4th

September 1965 from the Thai Shipping Company, Bangkok:—

"HARIAN 32 ARRIVE TUMPAT 7TH PLEASE UNLOADING QUICKLY. SINNAMKONG."

On 5th September 1965 Chop Chin Hin wrote a letter to the Assistant Controller of Customs, Kota Bharu (Exh. P10):—

"THAT THE ABOVE SHIP WILL (BE) CALLING AT TUMPAT PORT ON OR ABOUT THE 7TH SEPTEMBER 1965 TO EXCHANGE THE PORT CLEARANCE ONLY THEN WILL (BE) PROCEEDING TO KUANTAN. BECAUSE THE CONSIGNEE SHOULD BE M/S HOCK HIN & CO., 44, JALAN TEMERLOH, MENTAKAB, PAHANG."

On the same day Chop Chin Hin wrote a letter (Exh. P41) to the Marine Department, Tumpat, informing that:—

"THE ABOVE VESSEL IS EXPECTED TO ARRIVE TUMPAT FROM BANGKOK ON OR ABOUT 7TH SEPTEMBER 1965 TO EXCHANGE PORT CLEARANCE FOR KUANTAN."

It now became obvious that an import licence was not obtained to import the goods into the Federation via Tumpat.

The ship arrived at Tumpat harbour at 7.00 a.m. on 7th September 1965. At 7.50 a.m. it was boarded by officers from the marine department, customs department, and immigration department, and a clerk from Chop Chin Hin. The captain handed the boarding officer (P.W.11) the certificate of report of arrival (Exh. P39) and the crew list (Exh. P40) which were filled in and signed by the captain. Exh. P39 stated that:—

"THE NEXT PORT OF CALL, BANGKOK; PORT OF ULTIMATE DESTINATION (UNFILLED); EXPECTED DATE OF DEPARTURE, 8.9.1965."

The latter *inter alia* stated that the last port of call was Bangkok and the next port of call was Kuantan. It may again be noted that there were two crew lists prepared, namely, Exh. P40 and Exh. P4. Exh. P4 was prepared by the Thai Shipping Co. in Bangkok and signed by the captain. It states that the ship was to go to Tumpat and back to Bangkok. When the ship arrived at Tumpat the captain handed to the shipping agent Exh. P1 (the port clearance issued by the authorities at Bangkok) and Exh. P4. Exh. P40 was obviously prepared by Chop Chin Hin at Tumpat. At 9.00 a.m. the same clerk applied to P.W.4 for a port clearance from Tumpat to Kuantan, stating that the cargo was meant for Messrs. Hock Hin & Co., Kuantan. The port clearance was issued (Exh. P6). No cargo was discharged at Tumpat and Exh. P39 was amended by the boarding officer to read:—

"KUANTAN AS THE NEXT PORT OF CALL; BANGKOK AS THE PORT OF ULTIMATE DESTINATION; AND 7.9.1965 AS THE EXPECTED DATE OF DEPARTURE."

This witness explained that the alteration was made at the request of the captain who said that "it was a mistake". A new Manifest of Cargo was prepared by Chop Chin Hin (Exh. P5) which states:—

"MANIFEST OF CARGO SHIPPED ON BOARD THE M/S HARIN PANICH 32 FROM BANGKOK TO KUANTAN VIA TUMPAT SAILING 4.9.1965. 2,300 BAGS OF WHITE RICE. SHIPPERS M/S HOE THAI & CO. LTD.; CONSIGNEES M/S HOCK HIN & CO."

At 4.18 p.m. on 7th September 1965 Chop Chin Hin, Kota Bharu, sent a telegram (Exh. P35) to the Thai Shipping Co. as follows:—

"HARIN 32 ARRIVED OWING A/P NOT YET APPROVED SAILING KUANTAN DISCHARGE LETTER FOLLOWS HARIN 39 WHEN RECEIVING CARGO REPLY IMMEDIATELY."

The ship sailed for Kuantan at 6.00 p.m. on 7th September 1965.

On 8th September 1965 the Thai Shipping Co. telegraphed Chop Chin Hin (Exh. P48):—

"YOURS NOTED. MR. CHUAYEWYONG HAS AGREED WITH US IN BANGKOK THAT HARIN 32 THIS TRIP WILL UNLOAD AT KELANTAN ONLY AND WILL NOT SAIL TO OTHER PORTS SINCE YOUR A/P IS INSUFFICIENT UNABLE TO UNLOAD PLEASE ADVISE OUR CAPTAIN TO SAIL BACK TO BANGKOK. MUST NOT SAIL TO OTHER PORT DEFINITELY. IF YOUR A/P FOR HARIN 39 IS SUFFICIENT PLEASE ADVISE US AGAIN."

The ship duly arrived at Kuantan port at 7.20 p.m. on 9th September 1965. The cargo was seized by the customs. It is sufficient to say that Hock Hin & Co. possessed a valid permit in respect of the rice (Exh. P8).

The learned president found that the rice was within the customs port of Tumpat but that it was not consigned to that port. He continued:—

"It might have been that originally it was intended that the rice was to be consigned to Tumpat port; but, while the rice was still in the mid-ocean in the international waters the intention was altered and that the rice was to be consigned to Kuantan. The evidence of the shipping agent Chop Chin Hin clearly shows that the rice was consigned to Kuantan. In addition, Chop Chin Hin without any secrecy informed the superintendent of customs of the change of the consignment. Unfortunately in this case the boat had to come to Tumpat first in order to comply with the shipping regulations because it had a port clearance certificate only for Tumpat port. Nevertheless when the ship came within the Tumpat harbour limit its cargo of rice was not intended to be consigned to Tumpat. It merely came to Tumpat for the purpose of getting another port clearance certificate for Kuantan port."

Throughout the case too much emphasis was laid on the element of "import" and not enough on the inseparably essential element of "concerned in". I am of the view that recourse may be made to the provisions of section 167 item (8) of the Indian Sea Customs Act of 1878 which reads:—

"If any goods, the importation . . . . of which is for the time being prohibited or restricted . . . . be imported into . . . . India contrary to such prohibition or restriction."

The penalty leviable is stated as follows:—

"Such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding 1,000 rupees."

The High Courts in India have judicially determined that provision and I intend to refer

to those cases for they may afford some assistance in interpreting the scope and effect of section 131(1)(a) of our Customs Ordinance, 1952.

I will first refer to the case of *Gopal Navati* v. *P. C. Seth*,[1] a decision of the High Court of Bombay. That was a petition under article 226 of the Indian Constitution which resembles our paragraph 1 of the First Schedule to the Courts of Judicature Act, 1964, challenging the validity of an order of the collector of customs who had directed the petitioners to pay the penalty prescribed under item (8) of section 167 of the Act. Shortly stated, a person named Shankarlal who was in possession of two slabs of gold which were smuggled into India, arranged with the first petitioner who carried on the business of running a metal melting workshop, to melt them. In accordance with the arrangement, the first petitioner deputised the second petitioner to receive these gold slabs from Shankarlal's agent. Whilst these slabs were about to be melted in the first petitioner's shop they were seized under a search warrant. On these facts the collector of customs made a finding that the petitioners were liable to pay the penalty of a fine under the said section.

The only contention pressed on behalf of the petitioners before the High Court was that on the facts as found against the petitioners they could not be stated to have been concerned in any offence as mentioned in section 167 item (8) of the Act. It was not disputed that whoever brought into India the two gold slabs in question was acting contrary to the restriction and prohibition in force. At p. 480 the learned judge said:—

"It is apparent to me that the act of importation would be completed at the period of time when the goods cross the customs barrier. The act of importation contrary to restrictions and prohibitions would be complete once the customs barriers are crossed. It is at that moment of time that the restriction and prohibition are violated. Whatever is transacted with reference to the goods subsequent to that period of time would not be dealing with smuggled goods and/or goods imported contrary to prohibition and restriction. That dealing cannot be an act of importation into India contrary to prohibition and restriction. That appears to be the direct effect of the language of s. 167(8)."

In *Devi Chand J. & Co.* v. *Collector, Central Excise*,[2] a decision of the High Court of Madras, it was held that the person dealing in smuggled gold is not necessarily a person who is concerned with its importation. In that case the smuggled gold was received by a firm from several persons. The learned judge emphasised the necessity of proof that the person proceeded against must be shown to have arranged for the importation or abetted the importation or received the smuggled gold immediately after the importation, the receipt being a step in a series of steps which constituted the act of importation.

Both these cases were referred to with approval by the Appellate Division of the High Court of Calcutta in the case *Additional Collector of Customs* v *Sitaram*.[3]

The court said (at p. 246):—

"But before a person can be proceeded against under section 167(8) and a personal penalty imposed upon him for being concerned in the commission of the offence of such importation, it is essential to prove that he did take some part in the series of steps which culminated in the gold being brought into the country. It may well be that a person, without coming into physical contact with the smuggled gold, may yet be held liable for having been concerned in its importation. For example, if a man writes to an agent in a foreign country advising importation of foreign gold without the necessarv permit and he does nothing else, he will still be guilty if the gold reaches the limits of India although he may have been a thousand miles away from the smuggled gold."

At another passage the court said (at p. 247):—

"It seems plain that when in violation of a prohibition or restriction, gold is imported into this country, the process of importation must be held to be complete as it reaches its borders. If the gold is carried by sea and the vessel reaches an Indian port or the territorial waters, it is the moment of entry of the vessel which must be held to be the moment of importation of the gold. If anyone thereafter takes the gold out of the vessel, not having been in any way concerned with it earlier, he cannot be said to have been concerned in importation. It is equally plain that there need be no physical connection between the gold and the person charged. We have said that a man may be miles and miles away from the gold and yet if proof is available that he had an interest in or was concerned in its illegal importation, then surely he would be guilty of the offence described and punished in s. 167(8) of the Sea Customs Act."

The views expressed by the High Courts found favour with the Supreme Court. In *Radha Kishan* v. *Union of India & Ors.*,[4] a number of gold bars held to be smuggled were recovered from the person of the appellant. The court in allowing the appeal held that before a person can be said to be concerned in the commission of the offence of illegal importation, other circumstances indicating that the person had some connection with the importation of the goods prior to their actual importation have to be established. The court said (at p. 216):—

"The appellant can therefore be said to be concerned in the commission of the offence of illegally bringing into the country gold, if he had been in some way responsible for such 'bringing into the country'."

(At p. 217):—

"The requirements of the expression 'concerned in any such offence' in the penalty part of s. 167(8) are that the person to be penalised must be interested or involved or engaged or mixed up in the commission of the offence referred to in the first column of s. 167(8). The interest or the involvement or the engagement or the mixing up of the appellant in the commission of the offence must be at a stage prior to the completion of the offence of illegal importation of gold into the country. Once the gold has been imported, any subsequent interest, etc. in the smuggled gold cannot bring in the person showing such interest etc. within the purview of s. 167(8) for the purposes of the imposition of the penalty. The offence of importation of goods is complete when the goods have crossed the customs frontier. This is clear from the provisions of s. 19 and also from

those of s. 18 which, however, does not use the actual expression 'across the customs frontier'."

The provisions of section 167 item (8) of the Indian Sea Customs Act bear semblance to our section 131(1)(a) of the Customs Ordinance 1952. Although the wording of the two sections is somewhat different, I am inclined to think that they are in substance the same insofar as the point that I have to decide is concerned. With these observations I now approach the present case. In my view, section 131(1)(a) of the Customs Ordinance directly relates to importation of goods into the Federation contrary to the prohibition imposed, whether such prohibited goods are shipped, unshipped, delivered or undelivered. The offence of importation is complete when such goods, if carried by sea, have arrived within the limits of the customs port to which such goods are consigned. This is clear from the provisions of section 20 of the Customs Ordinance. If the rice is carried by sea and the vessel reaches the Federation port of consignment or the territorial waters, it is the moment of entry of the vessel which must be held to be the moment of importation of the rice. If anyone thereafter has any dealing with the rice, not having been in any way concerned with it earlier, he cannot be said to have been concerned in importation. The language employed by the legislature is wide. It is difficult to conceive how the legislature could have deliberately used wider terms than those employed in the paragraph in order to secure the punishment of anyone who may have anything to do in the process or operation which precedes the bringing of prohibited goods into the Federation. It is indicative of the fact that whoever imports into the Federation goods contrary to prohibition imposed is not the only person covered by the phrase "concerned in". The person who arranges to have the goods imported into the Federation contrary to the prohibition may be a person who is concerned in the offence as is mentioned in section 131(1)(a). Anyone interested or who consciously participates in any step whatever to promote or aid the object of illegally bringing goods into the Federation is caught within the purview of the section if such interest or involvement is at a stage prior to the completion of the offence of illegal importation.

In the present case there was importation when the ship conveying the rice arrived within the limits of Tumpat port. It was said that the consignment was for Kuantan. That contention was contrary to the evidence. The learned president found as a fact that the consignment was originally meant for Tumpat but that subsequently there was a change of plan. We are here concerned with the series of steps which constituted the act of importation at Tumpat. It is clear from the evidence that Chop Chin Hin, the respondents, had arranged for importation of the rice from the Bangkok firm who at their instruction had shipped them *via* Tumpat being the ultimate port of call. No import permit in respect of the said rice at Tumpat was obtained. Whatever was done subsequent to the act of importation is irrelevant for present consideration. Chop Hock Hin was not charged, and their interest may well be protected by the Minister under the provisions of section 125 of the Customs Ordinance.

If the change of plan is allowed to bring the case outside the meaning of the word "import", then the object of the Ordinance will be rendered nugatory. The case of *Heap Hoe & Co. Ltd., Penang,*[5] unreported in Selangor Criminal Appeal No. 32 of 1965, might well have to be decided the other way. The Privy Council case of *Canada Sugar Refineries Co.* v. *The Queen* [6] has no parallel because the facts there are dissimilar.

For the above reasons, I am of the view that the prosecution has established a *prima facie* case. I therefore direct the learned president to call for the defence in respect of both the charges.

Order accordingly.

Solicitors: *C. O. Lim & Co.*

WILLIAM WONG v. TAN YONG CHIM

[F.C. (Tan Ah Tah F.J., Chua & Winslow JJ.) June 6, 1968]

[Singapore — Federal Court Civil Appeal No. Y1 of 1968]

Practice and Procedure — Parties — Defendant — Amendment of writ to change defendant — Whether correction of a mere misnomer — Amendment sought after limitation period expired — Appearance of one party to stand as appearance of new defendant — Whether justified — Dispensation of service.

To an inquiry by the respondent's solicitors, the appellant's solicitors informed them that the owners of a certain vessel were a limited company called the "Winsen Steamship Company S.A.", carrying on business at a given address in Hong Kong. The respondent issued a writ addressed to the limited company. Finding that there was no trace of the limited company at the Registry of Companies in Hong Kong, the respondent amended the writ by addressing it to a firm which was carrying on a business having the same name and address as the limited company, and registered as a partnership at the Business Registration Office in Hong Kong. Subsequently, on being told that a foreign firm not carrying business within the jurisdiction could not be sued as a firm, the respondent amended the writ a second time by adding to it two individual defendants "trading as Winsen Steamship Company S.A.". The appellant, the first defendant, entered a conditional appearance and applied to have the writ and all subsequent proceedings set aside on the ground that the two defendants were never owners of the vessel in question. Thereupon, the respondent made a separate application to have the writ and all subsequent proceedings to be further re-amended showing the limited company as the defendant. The res-